QUICK GUIDE TO SUPPORT OBJECTIONS

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Objections to an order of the Support Magistrate

1. RIGHT TO OBJECT:

A. FCA 439(e) states that an objection may be filed to a *final* order of a Support Magistrate.

Prohibit filing of objections prior to completion:

- **Dunbar v. Hunter**, 131 Misc. 2d 706 (Fam. Ct. Monroe County, 1986)
- **Burry v. Raisbeck**, 159 Misc. 2d 488 (Fam. Ct. Onondaga County, 1993)
- **Rosado v. Muniz**, 2001 N.Y. Mis Lexis 1238 (Fam. Ct. Queens County, 2001

B. The statute is silent as to whether you may file an objection to a temporary order or a decision on motion.

C. No right but circumstances warrant review:

- **Torres v. Wade**, 46 Misc. 3d 1215(a) (Fam. Ct. Kings County, 2015)

D. Non-final orders not generally reviewed unless they can lead to irreparable harm :

- **Fisher v. Fritzsch**, 35 AD3d 1146 (3rd Dept., 2006)
- **McGrath v. McGrath**, 166 Misc. 2d 512 (1995)
- **Heinlein v. Heinlein**, 165 Misc. 2d 357 (Fam. Ct. Monroe County, 2015)

E. No right to object upon default.

- **Wideman v. Murley**, 548 NYS2d 102 (3rd Dept.,1989)

- **Menaldino v. Johnson**, 162 AD 2d 758 (3rd Dept., 1990)

- **Commissioner o.b.o. Nidia F.v. Paulino F.**, 146 Misc 3d 1166A (Fam. Ct. New York County 1990)

- **Monroe County v. Michael C**., 12 Misc 3d 1166A (Fam. Ct. Monroe County, 2006)

F. Order on consent is not generally subject to review.

- **Matter of Steuben County support Collection Unit v. Barholomew**, 2 AD3d 1434 (4th Dept.,2003)

- **Hackett v. Paluck** 100 AD3d 898 (2nd Dept., 2012)

- **Cabral v. Cabral** 61 AD3d 863 (2nd Dept., 2009)

- **Culton v. Culton** 2 AD3d 1446 (4th Dept., 2003)

But also see:

- **Chomik v. Sypniak** 70 AD3d 1336 (4th Dept., 2010): generally order on consent not subject to review BUT well settled that the Court maintains inherent power to vacate a judgement or order in the interest of justice, thus a consent order may be subject to vacatur.

2. TIME TO OBJECT:

1. FCA §439(e) states that an objection must be filed within *30 days* of service of the order (if received in court or personally served) or within *35 days* of the mailing of the order.

This is a jurisdictional requirement.

- **M/O Kimelfeld v. Menczelesz**, 2016 N.Y. App. Div. Lexis 1665 (2nd Dept.,2016)
- **M/O Yalvac v. Williams** 131 AD3d 622 (2nd Dept., 2015)
- **M/O Babb v. Danley** 123 AD3d 1028 (2nd Dept., 2014)

2. However, strict adherence to this mandate has not always been required; extension of time for filing may be granted:

- **Ryan v. Ryan,** 110 AD 3d 1176 (3rd Dept., 2013)
- **Worner v. Gavin**, 112 AD3d 956 (2nd Dept., 2013)
- **Nash v. Yablon-Nash**, 106 AD3d 740 (2nd Dept., 2013)
- **Corcoran v. Stuart** 215 AD2d 340 (1st Dept., 1995)
- **Ogborn v. Hilts** 262 AD 2d 857 (3rd Dept., 1999)

3. When does the 30/35 day clock start ?

The 30 day clock begins upon receipt of the order in court or in person. The 35 day clock is measured from the date of mailing. The court file must have an indication of when and to whom the order was mailed. This can most often be found at the bottom of the order, having been filled in by the clerk. If there is no evidence as to when an objection is personally received/mailed, the clock does not begin. Service of the order, with notice of entry is required.

- **Matter of Belolipskaia v. Guerrand** 65 AD3d 932 (1st Dept., 2009)
- **Galimberti v. Skillman**, 296 AD2d 550 (2nd Dept., 2002)
- **Ogborn v. Hilts**, 262 AD2d 857 (3rd Dept., 1999)
- **Comm. Soc. Serv. ex rel. Obremski v. Dietrich** 208 AD2d 474 (1st Dept., 1994)

4. Parties represented by counsel:

The Magistrate's orders must be served upon counsel to commence the objection clock. FCA§165; CPLR 2103(b); CPLR321(a)

Odunbaku v. Odunbaku 28 NY 3d 223 (2016)

5. What constitutes filing:

An objection is filed when actually received and time stamped by the clerk.

- **Bruckstein v. Bruckstein**, 78 AD3d 694 (2nd Dept., 2010)
- **Burke v. Burke**, 45 AD3d 591 (2nd Dept., 2007)

3. PROOF OF SERVICE

FCA§439(e) states the party filing an objection **shall** serve a copy upon the opposing party, who **shall have 13 days** from such service to serve and file written objections. Proof of service upon the opposing party **shall** be filed with the court at the time of filing **objections and any rebuttal.**

Note: the statute does not say what manner of service is required.

This is a jurisdictional requirement.

A. Failure to timely file proof of service constitutes adequate grounds to dismiss an objection. It is considered a failure of a condition precedent to review. (The second department is extremely strict in this regard.)

- **Hamilton v. Hamilton** 112 AD3d 715 (2nd Dept., 2013)
- **Girenti v. Gress** 85 AD 3d 1166 (2nd Dept., 2011)

● **Riley v. Riley**, 84 AD3d 1473 (3rd Dept., 2011)*

● **Burger v. Brennan** 77AD3d 828 (2nd Dept., 2010)

● **Buck v. Rogers**, 301 AD2d 973 (3rd Dept., 2003)

The Court in **Riley** stated they (3rd Dept.) "have never held it an abuse of discretion for a court to require adherence to the statutory requirements of FCA§439(e) or to dismiss objections upon a Party's failure to adhere to the statute."

But, strict compliance with requirements of 439(e) have not been strictly adhered to in some cases (particularly if there is evidence that the opposing party did in fact receive the objection/rebuttal).

● **Worner v. Gavin, Supra**

● **Nash v. Yablon-Nash**, Supra

B. Service on Parties represented by counsel.

CPLR2103(b) provision for service on an opposing party represented by counsel requires service on the attorney, not the party, unless they have withdrawn from representation in conformity with CPLR 321(b)(2).

● **Matter of Oneida County Dept. Of Social Serv. ex rel Hurd v. Hurd, 295 AD 2d**

70 (4th Dept., 2002)

● **Etuk v. Etuk**, 300 AD 2d 483 (2nd Dept., 2002)

But this principal could be disregarded:

●**M/O Baker v. Baker**, 80 AD3d 849 (3rd Dept., 2011)

● **Perez v. Villamil**, 19 AD 3d 501 (2nd Dept., 2005)

No longer able to disregard:

Odunbaka, supra, (pg 4)

C. Computing Days:

In calculating the 30/35 day period, Saturdays, Sundays and Holidays are **included** unless the last day falls on a Saturday, Sunday or Holiday. If the last day falls on a Saturday, Sunday or Holiday the party has until the next business day.

- **NY CLS Gen Const §25-a**
- **M/O Sinclair v. Annucci**, 2016 NY App Div Lexis 1727 (3rd Dept., 3/10/16)
- **Vazquez v. Flesor**, 128 AD3d 808 (2nd Dept., 2015)
- **M/O Fantauzzi v. NY State Div. Of Human Rights**, 113 AD3d 518 (1st Dept.,2014)

4. MECHANICS OF REVIEW:

Family Court Rule §205.37 (c) states the transcript of the support proceeding **shall** be prepared **where required** by the judge handling the objection, at the cost to the party filing the objection.

(Usually for the sake of expediency most court attorneys listen to the (FTR) electronic recording of the proceedings.) A person who is financially unable to pay the cost may seek leave of the court to proceed as a poor person pursuant to CPLR Article 11.

There is no requirement that the court must review the transcript before entering a decision on objections:

- **Smith v. Smith**, 197 AD 2d 830 (3rd Dept., 1993)
- **Avitzur v. Rose**, 174 AD 2d 843 (3rd Dept., 1991)

5. FORMAT:

A. There is no specific format as to how an objection may be drafted.

B. Factual issues not raised at the hearing must not be included as they cannot be raised by way of the objection.

- **Korosh v. Korosh**, 99AD3d 909 (2nd Dept., 2012)

● **M/O Carene S. v. Kendall S**., 96 AD3d 767 (2nd Dept., 2012)

●**M/O Niagara County Social Serv. v. Hueber**, 89 AD3d 1440 (4th Dept., 2011)

6. POWER OF THE COURT IN DETERMINING AN OBJECTION:

FCA439(e) states that upon review by the Judge, the Judge **shall** :

1) remand one or more issues of fact to the Support Magistrate

2) make, with or without holding a new hearing, his or her own findings of fact and order or
3) deny the objections.

Pending review of the objections, the order of the Magistrate **shall** remain in full force and effect and **no stay** of the order **shall** be granted.

The Judge **shall** act pursuant to 1,2,or 3 above **within 15 days** after the rebuttal is filed, or the time to file the rebuttal has expired.

7. SCOPE OF REVIEW:

Generally the objection process has been held tantamount to appellate review. Therefore specific objections must be raised to be preserved, and the trial court cannot raise and address an issue sua sponte.

● **Porter v. D'Adamo 113 AD3d 908 (3rd Dept., 2014)**

●**Cherrez v. Lazo**, 102 AD3d 781 (2nd Dept., 2013)

● **Renee XX v. John ZZ**, 51 AD3d 1090 (3rd Dept., 2008)

But also see:

● **Sannuto v. Sannuto**, 21 AD3d 901 (2nd Dept., 2005)

Although one party's objection was late, entire order subject to review based upon other party filing objection

●**Baker v. Rose**, 23 AD 3d 1112 (4th Dept., 2005)

Issue not raised in objection may be addressed pursuant to 439(e) granting the Court ability to make own findings, so long as the record supports those findings

● **Stauffer. Stubbs**, 13 Misc.3d 635,Family Court, Monroe County, 2006)*

*A determination by the SM are part of the Family Court, not separate lower court, thus all litigants entitled to determination by a Judge. Therefore able to treat objection as a de novo application and consider arguments first raised on objection.

Also remember **Chomik**, supra (pg.3) that a Court has the ability to vacate a judgment or order in the interest of justice.

Hearing: Make sure one was conducted ! Colloquy is not sufficient !

439(d)- must follow rules of evidence -

Query ?? What do you do when.....

Documents are referenced by the Magistrate but not in evidence ?

Documents are in evidence but not contained in the Court file/preserved ?

Pringle v. Pringle 296 A.D. 2d 828 (4th Dept.,2002)

8. STANDARD OF REVIEW:

A. Generally the standard of review is whether the Magistrate erred in law or fact, or abused their discretion.

B. There is great deference accorded the credibility assessment of the Magistrate regarding both witnesses and evidence.

● **Jill s. v. Steven S.**, 43 AD3d 724 (1st Dept., 2007)

● **Rubenstein v. Rubenstein**, 114 A.D. 3d 798 (2nd Dept., 2014)

●**Kennedy v. Ventimiglia**, 73 A.D. 3d 1066 (2nd Dept., 2010)

● **Columbia County Dept. Of Soc. Serv ex rel William O v. Richard O**.,

262 AD 2d 913 (3rd Dept., 1999)

Child Support & Objections

I. Procedural issues in Objections :

"Guide to Support Objections" in Family Court

II. Establishing Orders of Support

A. Compulsory disclosure- FCA §424-a

B. "Beyond the CAP" -FCA §413 (1)(c)(3) & §4131(b)(f)

C. Shared Custody vs. Split Custody

D. Imputing Income

III. Add- Ons

A. Educational Expenses

B. Child Care

IV. Modifications/Continuing Jurisdiction - FCA§451

A. Basis: 451(3)(a) & 451(3)(b)

Criteria: Substantial Change in circumstances
3 years have passed
15% gross income change
Incarceration

B. Opt out - Separation agreements

V. Interstate Cases (UIFSA)

i. FCA§ 580-201
Long - Arm Conditions

ii. FCA§580-204
Simultaneous proceedings

ii. FCA§580-205
CEJ - determining continuing exclusive jurisdiction

iii. FCA§580-207
Establishing an order
Identifying the Controlling Order

iv. FCA§580-205 & §580-206
Modification & Enforcement

II. Establishing orders of Support

A. Compulsory disclosure - FCA§424-a(a)

- **May not be waived by either party or the Court**

-Must file: -sworn statement of net worth no later than 10 days after the return date of the petition ; must include any assets transferred in last 3 years or length of marriage, whichever is shorter
-current paystub
-most recent filed state and federal tax returns
-W-2
- information regarding available health plans

If not complied with, what should the Magistrate do ?

424-a (b) - When **Respondent** fails to comply: (without good cause)

-the Court on its own motion or by application **SHALL** grant the relief demanded in the petition, or **SHALL** order that Respondent is precluded from offering evidence as to his/her financial ability to pay support

424-a (c) - When **Petitioner** (Not DSS) fails to comply: (without good cause)

- the Court **MAY** on its own motion or by application of any party adjourn the proceeding until such time as the petitioner files the documents

-does NOT apply to proceedings establishing temporary support or enforcement

SEE:

Dailey v. Govan, 136 A.D. 3d 1029 (2nd Dept., 2016)

Matter of Malcolm v. Trupiano, 94 A.D. 3d 1380 (3d Dept., 2012)

Fox v. Fox, 9 A.D. 3d 549 (3d Dept, 2004)

Court cannot adjudicate the merits in the absence of §424-a disclosure

Matter of Yemi O. V. Amanda O., 50 Misc. 3d 1058 (Fam. Ct. Queens Co., 2015)

Adjournment is the sole statutory authority, cannot dismiss the petition

Frustrating to the Respondent....multiple adjournments, large retroactive order...only remedy is the use of contempt powers (contempt would necessitate referral to a Judge)

B. Beyond the Cap - FCA §413 (1)(c)(3) & 413(1)(b)(f) - $143,00.00

When combined parental income exceeds the CAP the Court may either :

1) apply the appropriate percentage to income above the cap **AND/OR**
2) determine that a % award beyond the CAP is unjust and/or inappropriate and utilize the "F" factors in FCA§413(1)(f)

Cassano - 85 N.Y.2d 649

-Court not required to make findings as to children's actual needs

-Court must articulate reason to apply the percentage -"carefully considered the parties circumstances and found no reason to depart from %

C. Shared Custody vs. Split Custody

Shared custody: (of same child/ren)

Bast v. Rossoff, 91 NY 2d 723 (1998)- Shared custody does NOT alter the methodology of the CSSA ; parent who has physical custody more time, is the custodial parent

What to do when *Bast* results in an unjust order ?

Rubin v. Della Salla, 107 A.D.3d 60 (1st Dept., 2013)

-Father is custodial parent, assets of $20 million, Mother as non custodial parent must pay support to father, her income $12,000.00/ year.

-Lower court issued an order of support to mother; on appeal order was vacated citing the Bast case (although not unanimous) Dissent stated the child should not suffer because of the parents decisions, and children should be protected from a decline in living conditions based upon two households

Option: Adjust the order of support based upon the joint custody using a proportional approach. ...not authorized under the statute, but some support in the Rubin dissent.

Baraby v. Baraby, 250 A.D. 2d 201 (3RD Dept., 1998) - in 50/50 shared custody situation the parent with the Higher pro rata share of child support obligation is identified as the noncustodial parent; if results in inequity use the F factors

More recent cases-

spouse with greater income is deemed noncustodial parent for child support purposes

Barr v. Cannata - 57 A.D.3d 813 (2nd Dept., 2008)

Powers v. Powers - 37 A.D.3d 316 (1st Dept., 2007)

Split Custody : (each parent has physical custody of different children)

It is appropriate to use an offset methodology when the children are split between different households. Support should be calculated simultaneously for both children. The order of support for the non-custodial child should be considered an existing order of support, and compute support on that basis.(FCA §413(1)(b)95)(vii)(D)

Keane v. Boone, 189 Misc. 2d 60 (Fam Ct. , Ulster Cty, 2001)

This case provides you with a step by step example of how to handle a split custody order of support.

D. Imputing Income:

Child Support is determined by the parents' ability to financially provide for the child rather than their current economic situation

Volkernick v. Volkernick, 153 A.D. 3d 885, (2nd Dept., 2017)

FCA§413(1)(b)(5)(v)

"an amount imputed as income based upon the parent's former resources or income, **if** the court determines that a parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support"

Under some circumstances the Court found that the Petitioner did not have to prove Respondent deliberately reduced his income to avoid paying child support before imputing income

Goddard v. Goddard, 256 A.D 2d 545 (2nd Dept., 1998)

Since Goddard the Courts have found that proof of reduced income for the purpose of

avoiding payment of support,(and allowed imputation of income) can be shown in different ways, for example : by working at a reduced wage, failing to work in a position commensurate with education & experience, leaving a position to "try" a new field, or opening your own business and failing to provide income information. Therefore the Court is not bound by a party's account of their financial circumstances, but may base income upon the party's past income, education and earning capacity, as well as assets and lifestyle.

McElhaney v. Okebiyi 103 A.D. 3d 544 (1st Dept., 2013)
Maldonado v. Maldonado, 100 A.D. 3d 448 (1st Dept., 2012)
Patete v. Rodriguez, 109 A.D. 3d 595 (2nd Dept., 2013)
Hainsworth v. Hainsworth, 118 A.D. 3d 747 (2nd Dept., 2014)

The Court has considerable discretion in imputing income however, the decision to impute must specify the source, and the Court must state the basis for its decision to impute income with specificity.

Rohme v. Burns, 79 A.D. 3d 756 (2nd Dept., 2010)

III. ADD-ON

A. Educational Expenses:

Absent a voluntary agreement or special circumstances a parent is not obligated to contribute to a child's educational expenses.

FCA§413(1)(c)(7)

Where the Court determines, having regard for the circumstances of the case and the parties, and it is in the best interest of the children, the Court MAY award educational expenses for post-secondary, private, special or enriched education.

Relevant factors as to whether or not special circumstance exist and whether imposition of educational fees are appropriate by the Court are:

- the educational background of the parents

-the child's academic ability

-financial ability of the parent

Lewis v. Lewis, 144 A.D. 3d 1659 (4th Dept., 2016)

Amos-Richburg v. Richburg, 94 A.D.3d 1112 (2nd Dept., 2012)

Hammill v. Mayer, 66 A.D. 3d 1196 (3rd Dept., 2009)

Mitnick v. Rosenthal, 260 A.D. 2d 150 (1st Dept., 1999)

College Room & Board Fees:

A credit towards basic child support may be given if parent also paying for room and board or other living expenses while the child is away at school, (not tuition).

Keller-Goldman v. Goldman, 149 A.D. 3d 422 (1st Dept., 2017)

Tannenbaum v. Gilberg, 134 A.D. 3d 846 (2nd Dept., 2015)

DelSignore v. DelSignore, 133 A.D. 3d 1207 (4th Dept., 2015)

Dougherty v. Dougherty, 131 A.D. 3d 916 (2nd Dept., 2015)

Levy v. Levy, 52 A.D. 3d 717 (2nd Dept., 2008)

SUNY CAP:

Parties may agree or the Court may find that the appropriate level of expense for College should be limited to the cost of attending the state university.

Cases wherein the Court found the SUNY CAP to be both appropriate or inappropriate:

Pamela T. V. Marc B., 33 Misc 3d 1001 (NY Sup Ct., 2011)

Parker v. Parker, 74 A.D. 3d 1076 (2nd Dept., 2010)

Ocasio v. Smith, 70 A.D. 3d 952 (2nd Dept., 2010

Friedman v. Freidman, 143 A.D. 3d 665 (2nd Dept., 2016)

Time of Application:

College expenses can be made at any time, however filing too early may lead to dismissal if the basis for such an award is not yet evident.

Michael J.D. v. Carolina E.P., 138 A.D. 3d 151, (1st Dept., 2016)
Costa v. Costa, 46 A.D. 3d 495 (1st Dept., 2007)
Tan v. Gan Tooi Tan, 260 A.D. 3d 543 (2nd Dept., 1999)

College expenses beyond 21 years of age :

Calvello v. Calvello, 20 A.D. 3d 525 (2nd Dept., 2005)
Hejna v. Reilly, 88 A.D. 3d 1119 (3rd Dept., 2011)
Winski v. Russo Kane, 33 A.D. 3d 697 (2d Dept., 2006)
Shapiro v. Shapiro, 91 A.D. 3d 1094 (3rd Dept., 2012)

B. Child Care : FCA§413(1)(c)(4)

Where custodial parent is 1) working, 2) in school or vocational training **which the Court determines will lead to employment** the Court SHALL determine **reasonable** child care expenses.

Gina P. V. Stephen S., 33.A.D. 3d 412 (1st Dept., 2006)
Anonymous v. Anonymous, 31 A.D. 3d 995 (3rd Dept., 2006)

Expenses SHALL be prorated in the same proportion as the parties' income

IV. Modifications/Continuing Jurisdiction - FCA§451

Modifications can be made to an existing Family Court order or an existing Supreme Court judgment, including separation agreements that are incorporated but NOT merged into the divorce judgement

Modifications are commenced by the filing of a Petition

A. Basis for modification - Child Support

Prior to 2010:

Order/Judgement:

Upward Modification: must show a *substantial change of circumstances* or *inability to meet the needs of the child* with current order of support and resources of custodial parent

Downward Modification: must show a *substantial change of circumstances*

Agreements/Stipulations:

Upward Modification: must show an *unanticipated or unreasonable change of circumstances,* or *inability to meet the needs of the child* with the current order of support and resources of the custodial parent (Boden v. Boden, 42 N.Y. 2d 210; Brescia v. Fitts, 56 N.Y. 2d 132)

Downward Modification: must show an *unanticipated or unreasonable change of circumstances*

Post 2010

Order/Judgment & Agreements/Stipulations -

FCA§451(3)(a) - Modification upon a showing of a *substantial change in circumstances*

Incarceration SHALL not bar a finding of a substantial change in circumstances so long as incarceration not the result of non-payment of support or the offense was against the custodial parent or subject child (Post- Knight era);

Hunter v. Traynor, 49 Misc. 3d 973 (Livingston Cty, 2015)

Good synopsis of Knight rule and 2010 amendment

AND §451(3)(b)- unless the parties have specifically opted out of these provisions in a validly executed separation agreement or stipulation, may also modify based upon

i. 3 years has passed since the order was last entered, modified or adjusted, or
ii. There has been a change in either parties' gross income by 15% or more since the order was entered, last modified, or adjusted.

Note: - the provision states 15% of gross income, not adjusted gross

-reduction in income SHALL not be considered a basis fo modification unless it was involuntary and the party made diligent efforts to secure employment commensurate with education, ability and experience

-COLA increase is not a modification

- the separation agreement or stipulation must be entered into after October 13, 2010 to permit modifications under sub (b)-the non-retroactive clause is not in statute but in the final paragraph of the chapter law (L.2010,c.182,§13)

Zibell v. Zibell, 112 A.D.3d 1101 (3rd Dept., 2013)

-change in statute did NOT apply although divorce entered in 2012, separation agreement entered into prior to 2010

Rizzo v. Spear, 152 A.D. 3d 774 (2nd Dept., 2017)

Harrison v. Harrison 148 A.D. 3d 1630 (4th Dept., 2017)

Thomas v. Fosmire 138 A.D. 3d 1007 (2nd Dept., 2016)

Langani v. Li 131 A.D. 3d 1246 (2nd Dept., 2015)

*L.M v. B.M, 2017 NY Slip Op 51114(u) (Westchester Cty, 2017)-

Magistrate used the entire §451 language in findings; Family Court found properly denied on failure to show substantial change in circumstances- (did not mention the rest of the statutory scheme)

Spousal Support- 451 generally applies to spousal support orders; but not the 2010 amendments; See FCA§451 (3)(a)(b) & DRL §236B(9)(b)

Spousal awards through a **separation agreement or stipulation** may only be modified upon a showing of **"extreme hardship"** on either party.

V. Interstate Cases - see attachments